(35)

No. 03-1693

IN THE

# Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY *et al.*,
*Petitioners*,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND THE NATIONAL COUNCIL OF JEWISH WOMEN, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


AYESHA KHAN
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234

WILLIAM M. HOHENGARTEN *
IAN HEATH GERSHENGORN
VICTORIA H. JUEDS
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 467-4999

*Counsel for Amici Curiae*

* *Counsel of Record*


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## INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has regularly been involved as a party, as counsel, or as an *amicus curiae* in leading church-state cases before this Court and other federal and state courts. Americans United has long experience litigating challenges to government displays of religion and, indeed, is currently serving as counsel to the plaintiffs in several cases in the lower federal courts that challenge government-sponsored displays of the Ten Commandments. As an organization frequently involved in such litigation, as well as in other categories of cases brought under the Establishment Clause, Americans United believes that it can offer the Court special insight into the constitutional issues raised by this case.

People For the American Way Foundation ("PFAWF") is a non-profit, non-partisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and activists nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principles that

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

government officials must remain neutral toward religion, that they cannot act for the purpose of advancing religion, and that government displays that endorse religion trample on religious freedom and violate the separation of church and state.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief, which is consistent with NCJW's National Principle that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society."

## INTRODUCTION AND SUMMARY OF ARGUMENT

The displays of the Ten Commandments posted by the petitioner Kentucky counties in their courthouses violate the Establishment Clause because, regardless of their effect, the displays are animated by an improper purpose to advance or endorse a particular religion or religious belief. The record shows that the actual purpose of the government actors was nothing more or less than to display the Ten Commandments—as the Word of God—in the county courthouses. All their other actions with respect to the displays were intended to achieve that overarching religious objective.

Not surprisingly, the counties' courthouse displays of the Ten Commandments achieved their intended *effect* of advancing and endorsing the religious beliefs of particular faiths. The focus of this brief, however, is the independent



significance under the Establishment Clause of a government actor's actual *purpose*.

Petitioners and their *amici* seek to use this case to overturn long-standing precedent from this Court affirming time and again that when the government acts with the actual purpose of advancing, endorsing, inhibiting, or disapproving religion in general or a particular faith specifically, it violates the Establishment Clause. The Court should firmly reject this attempt to overturn well-established doctrine, which reflects the core Establishment Clause mandate that government must remain neutral in matters of religion. Neutrality is violated by a purpose to advance, endorse, inhibit, or disapprove religion or religious belief. Even if, unlike the posting of the displays at issue here, a government action did not result in an improper effect, government must not be allowed to pursue improper religious or anti-religious purposes, rather than act for legitimate secular ends. If the Court were to abandon its long-standing commitment to enforcing the Establishment Clause's concern with actual government purpose, this would open the door to blatant pursuit by government of religious ends dressed up in a thin, purportedly secular veneer, like the displays in this case. The purpose test has stood the test of time. Its elimination would serve no end except to unleash the very sectarian conflict in politics that the Establishment Clause was meant to guard against.

Nothing justifies the radical surgery proposed by petitioners and others here. There is no basis to the claim that inquiring into actual purpose is somehow unmanageable. Courts routinely determine the actual purpose motivating the actions of persons in many other areas of the law. Indeed, the actual purpose of government officials is critical in many areas of constitutional law in addition to the Establishment Clause. For example, government action that is not facially

discriminatory but has disparate effects will be invalidated under the Equal Protection Clause only if the government decisionmaker acted because of, rather than in spite of, the differential impact. Inquiring into actual purpose is no less manageable under the Establishment Clause than under the Equal Protection Clause, and it is equally critical to the constitutional guarantees of neutrality of both.

The United States' suggestion that the Court adopt an "objective purpose" test is just a *sub rosa* plea to eliminate inquiry into the decisionmaker's actual purpose altogether. *See* Brief Amicus Curiae of United States (December 8, 2004) (hereinafter, "U.S. Br.") What the United States labels "objective purpose" is nothing other than the objective *effect* of a display or other government action. *See id.* The United States' test thereby retains a purpose prong in name alone. If adopted, this proposal would prevent courts from inquiring into the actual purpose that motivated government action, even when an official candidly admits that the action was for the purpose of endorsing or disapproving particular religious views. The Court should not accept this invitation to put blinders on the Establishment Clause.

To fulfill its critical role in guarding against government officials undertaking to advance or inhibit religion or religious belief, the examination of the actual purpose behind a government action under the Establishment Clause must have teeth. Thus, as this Court has frequently made clear, moderate deference to the stated purposes of government officials should not prevent courts from exposing sham secular purposes. As in any area of the law, there should be no artificial limitations on the evidence that may be considered in discerning whether the actual purpose of a government actor is impermissible under the Establishment Clause. Equally important, the mere presence of some secular purpose cannot save invalid actions when the



government's predominant purpose is one of advancing or endorsing religion. The Court should not countenance subterfuges that would make a mockery of the Establishment Clause.

## ARGUMENT

### I. Barring Government From Acting With The Actual Purpose Of Advancing Or Endorsing Religion Is A Core Function Of The Establishment Clause.

This Court's precedents establish unambiguously that the Establishment Clause bars government officials from acting with the actual purpose of advancing or endorsing—or inhibiting or disapproving—religion generally or particular religions specifically. No ground exists for brushing aside *stare decisis* and departing from that settled precedent. To the contrary, preventing government from pursuing an actual purpose of advancing, endorsing, inhibiting, or disapproving religion is critical to achieving one of the Establishment Clause's central goals: ensuring that government remains neutral in religious matters. Nor is there merit to the argument that inquiry into actual purpose should be abandoned because it is somehow unworkable. Discerning an actor's actual purpose or intent is a core competence of the judicial power, and one that is central in many other areas of constitutional law. There is no justification for abandoning the time-tested purpose inquiry—whether overtly, as requested by petitioners, or covertly, by collapsing purpose into effect under the rubric of "objective purpose," as proposed by the United States.

#### A. Under Long-Settled Precedent, Improper Religious Purpose Is a Sufficient and Independent Ground for Setting Aside Government Action.

This Court has long held that under the Establishment Clause, government officials may not act with the purpose of

advancing or endorsing religion. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). The Court reaffirmed the independent importance of assessing purpose when it summarized its Establishment Clause jurisprudence in the three-prong test articulated by *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citations and quotation marks omitted). The Court has repeatedly applied that analytic framework when reviewing government actions challenged under the Establishment Clause. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592 n.44 (1989) (citing cases). As the Court recently reaffirmed, "[t]he Establishment Clause . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002); *see also id.* at 669 (O'Connor, J., concurring) (explaining that Establishment Clause purpose and effect "test today is basically the same as that set forth in *School District of Abington Township v. Schempp*, 374 U.S. at 222").[2]

The prongs of the established test are each independent and conclusive, so that a finding of improper purpose under the first prong is dispositive. "If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria is necessary.'" *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)); *see also County of Allegheny*, 492 U.S.

[2] In *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997), the "entanglement" prong was folded into the "effects" prong, at least with respect to cases concerning government aid to religious educational institutions. Entanglement is not at issue in this case, however.



at 592 (noting that purpose was decisive in *Wallace* and *Edwards*). Even if a government program may not ultimately have an unconstitutional effect, a finding of religious purpose invalidates the government action under the Establishment Clause. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail").

In recent years, particularly in cases concerning religious displays on public property, the Court has refined its Establishment Clause jurisprudence by emphasizing the question of whether the government improperly *endorses* (or disapproves of) religion. *See, e.g., Allegheny*, 492 U.S. at 592-93; *Lynch v. Donnelly*, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring). Some lower courts—most notably and explicitly the Third Circuit—have stated that "[u]nder the 'endorsement' approach, we do not consider the County's purpose in determining whether a religious display has violated the Establishment Clause; instead, we focus on the *effect* of the display on the reasonable observer." *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 261 (3d Cir. 2003).[3] But that directly contradicts this Court's formulation of the endorsement standard, which separately preserves both a purpose and an effect prong.

[3] *See also Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004); *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144, 174 (3d Cir. 2002), *cert. denied*, 534 U.S. 942 (2003). Although the Third Circuit continues to consider purpose separately under *Lemon*, it treats the endorsement standard and *Lemon* as "separate tests" to be applied seriatim and, as explained above, eliminates consideration of actual purpose in favor of a purely objective standard when considering endorsement.

As Justice O'Connor explained in her seminal concurrence in *Lynch*, "[t]he meaning of a statement to its audience depends both on the intention of the speaker, and on the 'objective' meaning of the statement to the community." 465 U.S. at 690 (O'Connor, J., concurring). "Examination of both the *subjective* and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning." *Id* (emphasis added). Accordingly, improper endorsement (or disapproval) of religion may be established *either* by showing an improper purpose of endorsement *or* by showing an improper effect of endorsement. *See id.* ("To answer th[e] question" of endorsement, court "must examine *both* what [the state] intended to communicate" and "what message [it] actually conveyed" to a reasonable observer) (emphasis added). Under this analysis, then,

> [t]he *purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion*. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. *An affirmative answer to either question should render the challenged practice invalid.*

*Id.* (emphasis added). Accordingly, the endorsement analysis preserves the Court's well-established framework for invalidating government action that has an improper actual purpose, regardless of its objective effect (and vice versa). *See* Richard H. Fallon, Jr., *Implementing the Constitution*, 111 Harv. L. Rev. 56, 92-93 (1997) ("[T]he 'endorsement' test that has been favored by some Justices in recent years as a measure of Establishment Clause violations retains a place for inquiries into governmental purpose").

In sum, the Court "continue[s] to ask whether the government acted with the purpose of advocating or



inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini*, 521 U.S. at 222-23.

### B. Prohibiting Government From Acting With the Actual Purpose of Advancing or Endorsing Religion Is Necessary to Safeguard the Fundamental Establishment Clause Mandate of Government Neutrality with Respect to Religion.

No ground exists for disturbing this settled understanding that, regardless of the objective effect of its action, government may not act with an improper religious purpose. To the contrary, the independent significance of the inquiry into purpose is a crucial lynchpin for maintaining a core Establishment Clause mandate: government neutrality concerning matters of religion. Ensuring that government actions are not motivated by an improper purpose of advancing, inhibiting, endorsing, or disapproving religion is necessary to guarantee that neutrality.

The Court has long recognized that a fundamental premise of the Religion Clauses is that "the State is firmly committed to a position of neutrality" with respect to religion. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Thus, "'[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (quoting *Comn . for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-793 (1973)). Disapproval of religion is likewise proscribed. *See Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) ("[G]overnment is to be neutral in matters of religion, rather than showing either

favoritism or disapproval towards citizens based on their personal religious choices . . .").[4]

Prohibiting government from acting with the purpose of advancing or endorsing religion is critical to safeguarding this neutrality. "The Establishment Clause's 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987); *see also Schempp*, 374 U.S. at 222 (framing the test for neutrality in terms of purpose and effect). It also ensures that neutrality is more than merely superficial. "Purpose is a necessary backstop to facial neutrality. A law's facially neutral categories may be pretextual, especially where they produce disproportionate effects. The absence of a strong secular justification for the categorization is the best evidence that the program favors religion over nonreligion, or one religion over another." Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 144 (1992); *see also id.* ("abandoning the purpose prong would be an overreaction").[5] Indeed, one commentator has even

[4] Of course, neutrality "is by no means the only 'axiom in the history and precedent of the Establishment Clause.'" *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (O'Connor, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring)); *see also Mitchell*, 530 U.S. at 884 (Souter, J., dissenting) ("The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretive efforts").

[5] Accordingly, inquiry into purpose may also serve to confirm instances when government action has the improper effect of advancing (or inhibiting) religion. Determining whether a government action has the impermissible effect of endorsing religion "depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results



argued that "the secular purpose doctrine cannot be discarded . . . without effectively reading the Establishment Clause out of the Constitution altogether." Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 88 (2002). Whether this overstates the case or not, it is beyond peradventure that a government act taken with improper purpose necessarily violates the Establishment Clause in its own right, regardless of the act's effect.

In sum, "the secular purpose requirement . . . serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce." *Wallace*, 472 U.S. at 75-76 (O'Connor, J., concurring).

### C. Determining a Government Actor's Actual Purpose Is Not Unmanageable But Is Instead a Core Competence of the Judiciary Exercised in Many Areas of Constitutional Law.

The Court should also reject the argument that inquiring into a government actor's actual purpose is somehow unworkable. In many areas of the law—not least constitutional law—courts must frequently determine the actual purpose or intent of persons, including government actors and entities.

with unanimous agreement at the margins." *Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring). In these difficult cases, evidence of an improper purpose—which may be undisputed or candidly admitted—can tip the balance toward a finding of improper effect.

### 1. Determining the actual purpose behind an action is a core competence of the judiciary.

Some members of the Court have suggested abandoning the purpose test on the ground that determining the subjective motivation behind a government act is too difficult. *See Edwards*, 482 U.S. at 640 (Scalia, J., dissenting). On this view, "while it is possible to discern the objective 'purpose' of a statute, (i.e., the public good at which its provisions appear to be directed), . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Id.* at 636. *But see infra* Section I.D (criticizing concept of "objective purpose"). Because of this difficulty, the argument goes, "judges . . . will very likely reach the wrong conclusion." *Id.*[6]

That objection to the purpose inquiry is fundamentally misplaced. There is nothing mysterious about determining an actor's purpose. "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, Jr., *The Common Law* 3 (Little, Brown & Co. 1923) (1881); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 322 (1997) ("[I]t is not particularly difficult to make reasonable judgments about the motivations behind legislation in most cases"). Courts, including this Court, have looked to a variety of sources, including statutory text, social context, and the history of government action, to determine the actual purpose behind government action. *See infra* Part II.

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[6] The argument that determinations of purpose are especially complex with respect to collegial bodies has also been advanced. *See Edwards*, 482 U.S. at 638 (Scalia, J., dissenting). This problem is alleviated under the Establishment Clause by framing the purpose inquiry as one of "predominance." *See infra* Part III. In any event, this difficulty is no greater under the Establishment Clause than it is under any of the other areas of law in which intent is relevant. *See infra* Section I.C.2.



In some cases, the existence of an improper purpose is not even a subject of dispute. Not every government actor with the actual purpose of advancing or endorsing religion dissembles or tries to hide that purpose. Instead, he or she may proclaim it, as then-Alabama Chief Justice Moore did when erecting a granite monument inscribed with the Ten Commandments in the rotunda of the state Judicial Building. As the Eleventh Circuit made clear in finding an improper purpose, "no psychoanalysis or dissection is required" in such a case, "where there is abundant evidence, including his own words, of the Chief Justice's purpose." *Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003). Similarly, in *Wallace v. Jaffree*, the Court found "unrebutted evidence of [improper] legislative intent," evidence which was simply "confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case." 472 U.S. at 58.

But even considering that determinations of actual purpose—like all determinations of fact—are sometimes difficult, it by no means follows that courts are ill-suited to the task. On the contrary, such determinations reflect a core competence of the judiciary. "Judicial review of legislative justifications and motives might well be the task judges are most well positioned to perform." Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711, 729 n.45 (1994). It may even be that judges are better able to identify improper motivations than improper effects. For "if we ask what subject matter judges as a class are most knowledgeable about (aside from legal doctrine), it is surely politics. It is not physics, chemistry, biology, engineering, economics, social psychology, and the countless other disciplines" relevant to assessing the effects of government action. Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v.

Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1872, 1872-73 (1987). Thus, "the argument that courts lack the competence . . . to engage in purpose scrutiny is highly suspect." Bhagwat, 85 Cal. L. Rev. at 322.

**2. Other areas of constitutional law likewise turn on the actual purpose behind government action.**

Concern with government purpose pervades constitutional law. Decades of constitutional jurisprudence rest on "the idea that the quality and permissibility of governmental acts, and hence their constitutionality, should sometimes depend on their purposes." Fallon, 111 Harv. L. Rev. at 98.

In Commerce Clause cases, for example, the Court has examined purpose as well as effect in deciding whether a state law improperly discriminates against interstate commerce. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("The choice of constitutional means . . . cannot guarantee the constitutionality of the program as a whole. . . . [O]ur cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects"); *Bachus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (noting that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of . . . discriminatory purpose") (citing *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977)). Challenges under the Bill of Attainder Clause require examination of legislative purpose under a "test of punishment [that] is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977). Purpose has likewise been found determinative in Free Exercise cases. *See, e.g., Church of the Lukumi Babalu*



*Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down facially neutral ordinance enacted with actual purpose of targeting practices of Santeria religion).

Nowhere has the Court paid greater consideration to governmental purpose than in its Equal Protection jurisprudence. The Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), made discriminatory purpose the central focus of claims of racial discrimination brought under the Equal Protection Clause. *See Village of Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). And the Court in *Adarand Construction v. Pena*, 515 U.S. 200 (1995), justified strict scrutiny analysis by its ability to "smoke out" improper legislative "goal[s]." *Id.* at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). But concern with discriminatory purpose has not been limited to racial classifications or heightened scrutiny. Even under rational basis review, some purposes "such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *accord Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

The relevant purpose in these other areas of law, as under the Establishment Clause, is the actual purpose of the government decisionmaker, not a hypothetical "objective purpose" attributed to her by an observer. As the Court noted in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), "'discriminatory purpose . . . implies the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.* at 279. Thus, when asked to review a facially neutral provision of the Mississippi State

Constitution, the Court concluded without dissent that it violated the Equal Protection Clause because its "original enactment . . . was motivated by a desire to discriminate against blacks." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). And the Court did so despite its observation that "[p]roving the motivation behind official action is often a problematic undertaking." *Id.* at 228.

Questioning the role or utility of inquiring into legislative purpose in Establishment Clause challenges would call into question the purpose analysis in these other areas of law where it also has been central. Occasional difficulty in assessing purpose cannot justify abandonment, or even denigration, of this essential component of Establishment Clause jurisprudence. Indeed, "it would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts." McConnell, 59 U. Chi. L. Rev. at 143.

### D. The Court Should Reject the United States' Suggestion That It Abandon Inquiry into Actual Purpose and Look Instead at "Objective Purpose," Which as Defined by the United States Is Synonymous with Effect.

The Court should likewise reject the argument of the United States, as *amicus curiae*, that "[t]he Establishment Clause inquiry should turn upon the objective purpose served by the display as a whole, not subjective motivation." U.S. Br. at 6. With respect to "passive displays," such as that here, the United States would limit inquiry to "the objectively discernible purpose," defined as, "whether the display itself . . . expresses favoritism for or an endorsement of religion." *Id.* at 26. Although the United States' proposal purports to preserve a separate purpose prong under the Establishment Clause, in reality the Government's so-called



"objective purpose" test collapses purpose into effect, thereby eviscerating the independent significance of the former. It is therefore in conflict with settled law and the fundamental Establishment Clause mandate of neutrality.

The Court's precedents leave no room for doubt that the "purpose" that is relevant to the Establishment Clause is the *actual purpose* behind the government's action, which has an inherently subjective aspect and cannot be reduced to an objective test. "*Lemon*'s first prong focuses on the purpose that animated the adoption of the Act." *Edwards*, 482 U.S. at 585. Purpose, properly understood in this context, is what motivates action; it is specific to the decisionmaker and necessarily subjective. This Court has made clear that it was scrutinizing actual, subjective intent in those cases where it struck down state action on the basis of impermissible religious purpose. *See, e.g., id.* at 587 (evaluating "governmental intention" and "the purpose of the legislative sponsor"); *Wallace*, 472 U.S. at 57 (noting testimony of the bill's sponsor that "[he] did not have no other purpose in mind" when he proposed the bill); *Epperson v. State of Ark.*, 393 U.S. 97, 108 (1968) ("[F]undamentalist sectarian conviction was and is the law's reason for existence"); *see also Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (explaining that this Court's Establishment Clause standard requires "inquiry into the subjective intentions of the government"), *cert. denied*, -- U.S. --, 124 S. Ct. 1750 (2004). Indeed, the Court has "consistently described the Establishment Clause as forbidding not only state action *motivated by* the desire to advance religion, but also that *intended to* 'disapprove,' 'inhibit,' or evince 'hostility' toward religion." *Edwards*, 482 U.S. at 616 (Scalia, J., dissenting) (emphasis added).

The United States' proposal that the Court should examine only the "objective purpose served by the display

itself" to determine "whether the display itself—based on its design, content, or emphasis—expresses favoritism for or an endorsement of religion," U.S. Br. at 26, truncates the inquiry into the actual purpose behind a display. While the labels "objective" and "subjective" can have varied meanings depending on context, "objective purpose" as defined by the United States refers solely to the message an objective observer would discern from the display itself.[7] That is exactly the inquiry under the Establishment Clause's *effect* test. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"). Thus, the ultimate question to be answered by the effect inquiry—as under the "objective purpose" standard proposed by the United States—is "the 'objective' meaning of the statement in the community," whereas the ultimate question to be answered by the purpose prong is the actual "intention of the speaker." *Id.* "[B]oth the subjective and the objective components of the message communicated by a government action," *id.* at 690-91, must be neutral with respect to religion. Restricting judicial review to the objective component alone may allow government action to stand when it is intentionally taken to promote religion.

To be sure, the objective message sent by a display may well be *evidence*—in some instances, the best evidence—of the government's actual or subjective purpose in posting it. If a government official erected a display on public property

[7] Indeed, it is not at all clear what the words "objective purpose" might mean if they denote neither the actual purpose of the actor nor the objective effect of his actions. *See* Fallon, 111 Harv. L. Rev. at 73 n.99 ("The notion of a statute having an objective aim, that is different from both the subjective purpose of those who enacted it and at least partially distinct from its effects, is not wholly free from mystery").



of the Ten Commandments under a caption prominently asserting, "This is the Word of God," hardly any other inference would be possible than that the official acted with the actual purpose of advancing and endorsing the specific faiths adhering to that purely religious doctrine. In such an instance, the actual purpose and objective effect of the display would be one and the same. But that is not always true, and the objective meaning of a display is not always the only or best evidence of the actual intent of those who created the display. As Justice O'Connor explained in *Lynch*, "listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker." 465 U.S. at 690 (O'Connor, J., concurring). "If the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience . . . will inevitably receive the intended message." *Id.* But the United States' exclusive focus on whether the "objective purpose" of "the display itself" is to "express[] favoritism for or an endorsement of religion," U.S. Br. at 26, would preclude any inquiry into the "intended message" of a display, even when distinct from the "message determined by the 'objective' content of the statement." *Lynch*, 565 U.S. at 690.

The fundamental defect in the position of United States is highlighted by a hypothetical variation on the recent case of Alabama Chief Justice Moore, who "installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both state and church." *Glassroth*, 335 F.3d at 1284. His religious purpose was "self-evident" and the display plainly unconstitutional. *See id.* at 1297. If the United States' "objective purpose" standard were

accepted, however, Chief Justice Moore could have continued to pursue his actual purpose—which was admittedly to endorse a particular religious faith—by framing the monument with prominent secular window dressing, such as depictions of historical or legendary instances of secular lawgiving. If an observer of the display would believe that its "objective purpose" was to commemorate lawgiving, then it would be constitutional on the United States' view, notwithstanding Chief Justice Moore's candid admission that his actual purpose continues to be an "acknowledge[ment of] the law and sovereignty of the God of the Holy Scriptures, and . . . 'God's overruling power over the affairs of men.'" *Glassroth*, 335 F.3d at 1296. Under the United States' "objective purpose" standard, government actors could act with the most impermissible religious preferences or hostilities—provided they do so in a way that obscures their intentions. The neutrality principle would be eviscerated.[8]

Of course, that is essentially what occurred in this case. Although petitioners have not been as forthright concerning their religious purpose as was Chief Justice Moore, consideration of all the evidence in the record in this case gives rise to the unmistakable inference that the petitioners' actual purpose was to display the Ten Commandments—an indubitably religious text—no matter what.[9] The additions of purportedly secular texts—many of which emphasized the display's religious theme or, alternatively, had no discernable

[8] Indeed, the United States would not even require that the secular window-dressing combine with the religious text to create a coherent message. Any combination of secular and religious texts no matter how "uncommonly silly or disunified," U.S. Br. at 21 n.11, appears to pass muster under the Government's "objective purpose" standard.

[9] "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41 (1980).



connection to the display of the Ten Commandments—were simply an effort to obscure the objective effect of endorsement, even while ensuring that the sacred text the officials regard as the Word of God remains enshrined in the courthouses.

## II. Reviewing Courts Can And Must Look Behind Pretextual Statements Of Secular Purpose That Seek To Mask An Impermissible Religious Purpose.

In order to realize the goal of ensuring government neutrality with respect to religion, the inquiry into purpose must be rigorous. In particular, although the judiciary owes some deference to decisionmakers' statements of purpose, the inquiry is only meaningful if courts evaluate articulations of secular purpose in light of all available evidence and disregard those that are shams. The displays under consideration reflect an attempt to use secular "window dressing" to obscure or distract attention from government actions impermissibly taken to advance or promote religion. Reviewing courts must question carefully those government actions that have been modified in an effort to dilute their religiosity, to determine whether the modification reflects a genuine secular purpose, or merely attempts to camouflage the original religious purpose.

Of course, a decisionmaker's stated purpose may be religious on its face. *See, e.g.*, *Wallace*, 472 U.S. at 56-57 ("The sponsor of the bill . . . indicat[ed] that the legislation was an 'effort to return voluntary prayer' to the public schools.'") (quoting App. 50); *Glassroth*, 335 F.3d at 1296 ("Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures"). With a statement of religious purpose, a reviewing court's inquiry is at an end and the conclusion

straightforward: the action motivated by the improper purpose is unconstitutional.

But when the government advances a purportedly secular purpose, the court must verify that the stated purpose in fact motivated the challenged action. In such cases, "the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (alteration in original) (citing *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). Thus, mere articulations of a secular purpose are clearly not sufficient to justify a challenged action. The purpose inquiry is concerned with identifying actual purpose, not a hypothetical purpose that might plausibly justify, but did not in fact motivate, the challenged action. *See Edwards*, 482 U.S. at 595 (noting that "post-enactment testimony of outside experts" who did not "participate[] in or contribute[] to the enactment of the law or its implementation" "is of little use in determining the Louisiana Legislature's purpose in enacting this statute"). "Under this Court's rulings . . . such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Stone*, 449 U.S. at 41.[10]

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[10] Courts must be especially skeptical of secular purposes that are advanced only after an action is challenged. Thus, the Seventh Circuit gave little weight to a "secular purpose of recognizing the historical and cultural significance of the Ten Commandments, issued on the eve of litigation." *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001). Similarly, in the present case, after first displaying *only* the Ten Commandments, the petitioner counties have now attempted to attribute their modified displays to a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law." *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001). The Establishment Clause's purpose prong is not such a "low threshold,"



The display of material with "an obvious religious nature" to further an allegedly secular purpose should put the reviewing court on alert. *Books v. City of Elkhart*, 235 F.3d 292, 303 n.8 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001). The choice of religious texts or symbols strongly suggests that the purpose for the display was in fact religious, particularly where, as here, the religious text was the *only* material displayed originally. The United States misstates the law on this point when it asserts that "the controlling question is whether the display as a whole *serves* a secular purpose." U.S. Br. at 18 n.8 (emphasis added). On the contrary, the controlling question is, and should remain, whether the *actual purpose* behind the display was an improper one. The inclusion of secular window dressing will not affect the analysis if the government was motivated by a desire to display religious material for the purpose of advancing religious belief.

As has always been true of Establishment Clause analysis, the purpose inquiry is fact-specific. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). The true purpose of the government actor responsible for the challenged program, endeavor, or display must be evaluated in light of all relevant evidence of purpose. A court may start with the text of the statute or display, for text alone may reveal improper purpose. *See, e.g., Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314-15. But other evidence may also be relevant, and therefore essential, to a court's inquiry. *See id.* at 315 ("Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding [the] adoption

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*Freethought Soc'y*, 334 F.3d at 267, as to be satisfied by such a clearly implausible post hoc rationalization.

[of the challenged policy]"); *Edwards*, 482 U.S. at 595 ("[I]n determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute") (citations omitted). Where the text is ambiguous, whether facially neutral or presenting some combination of religious and secular material, contextual evidence may be decisive. *See Hunter*, 471 U.S. at 229 (noting without dissent that "evidence of legislative intent . . . consist[ing] of the proceedings of the convention, several historical studies, and the testimony of expert historians" was sufficient to "demonstrate[] conclusively that [the challenged provision of the Alabama state constitution] was enacted with the intent of disenfranchising blacks").

Protestations of the dissent below notwithstanding, consideration of a decisionmaker's history of conduct as evidence of purpose does not impose an "indelible unconstitutional 'taint'" on all future action. *ACLU v. McCreary County*, 354 F.3d 438, 477 (6th Cir. 2003). Evidence of a course of conduct is plainly *relevant to* the ultimate question of actual purpose, here as in all areas of the law. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 ("[I]n light of the school's history of [unconstitutional conduct], it is reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice") (internal quotation omitted). The inference is inescapable in this case that the actual purpose of the government actors was at all times to display the Ten Commandments in their county courthouses because of their religious significance. *Cf. Stone*, 449 U.S. at 42 (per curiam) ("Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this may be as a matter



of private devotion, it is not a permissible state objective under the Establishment Clause"). Everything else was simply a means to obtain the counties' religious end. Even the purportedly secular documents displayed with the Ten Commandments were carefully chosen and excerpted to link religion and government. That does not mean that these decisionmakers could never create a display that included some religious text if in fact the display had neither an impermissible purpose nor an impermissible effect. But in this particular case, the counties' *actual purpose* was never a permissible one.

## III. The Establishment Clause Is Not Satisfied By The Mere Existence Of Some Secular Purpose, No Matter How Dominated By An Impermissible Religious Purpose.

The record in this case does not suggest that petitioners acted with *any* actual secular purpose. Their purported secular purposes were clearly pretextual, as the court below recognized. But even if the petitioners had some subsidiary secular purpose, it is clear that the *dominant* purpose behind these displays was to venerate the Ten Commandments and to have citizens reflect on that religious text.

The secular purpose requirement "is not satisfied. . . by the mere existence of some secular purpose, however dominated by religious purpose." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). This Court has frequently made clear that government action violates the Establishment Clause where it was motivated by a *predominant* religious purpose. In *Edwards v. Aguillard*, for example, the Court held that a Louisiana statute violated the Establishment Clause "because the primary purpose of the Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 594. Similar standards were applied in *Wallace v. Jaffree*, *see* 472 U.S. at 56 (requiring that the "actual purpose" be

"clearly secular"), and *Stone v. Graham*, *see* 449 U.S. at 41 (identifying the "pre-eminent purpose" of the challenged state action).

Thus, a decisionmaker's purpose need not be entirely religious to violate the Establishment Clause. Dicta in *Bowen v. Kendrick*, 487 U.S. 589 (1988), does not dictate a different standard. While the majority there did suggest that "a court may invalidate a statute only if it is motivated wholly by an impermissible purpose," this statement was not essential to the holding of the case. In fact, the majority went on to hold that the statute in question "was motivated primarily, if not entirely, by a legitimate secular purpose." *Id.* at 602. Moreover, that dictum did not accurately summarize precedent. Neither *Edwards*, nor *Wallace*, nor *Stone*, all decided before *Bowen*, purported to apply a "wholly religious" standard. And Justice O'Connor, who cast the deciding vote in *Lynch*, explicitly disagreed with Chief Justice Burger's lead opinion for the Court on this point. *Compare Lynch*, 465 U.S. at 690-91 *with id.* at 681 n.6. Previous statements by the Court, such as the conclusion in *Stone*, that a challenged government action "had no secular legislative purpose, and is therefore unconstitutional," 449 U.S. at 41, described a sufficient condition for finding an Establishment Clause violation based on improper purpose, not a necessary one.

Finally, both this Court's subsequent case law and fidelity to *stare decisis* confirm that the proper standard under the purpose prong continues to be that state action motivated by a predominant religious purpose violates the Establishment Clause. The majority in *Santa Fe* struck down a challenged school prayer policy based on a "reasonable . . . infer[ence]" regarding "the specific purpose of the policy." 520 U.S. at 309. Nowhere did the Court determine that the actual policy was "wholly" religious. Indeed, such a



determination would be exceedingly difficult to make, for "[r]arely can it be said that a legislature or administrative body . . . made a decision motivated solely by a single concern." *Village of Arlington Heights*, 429 U.S. at 265. Insistence on such a standard would render the secular purpose requirement a virtual dead letter. Fidelity to *stare decisis* forbids the casual dismissal by dictum of a component of Establishment Clause analysis that has endured for over forty years. *See Zelman*, 536 U.S. at 648-49 (O'Connor, J., concurring).

A reviewing court must therefore ensure that, when government decisionmakers were influenced by a purpose to advance religion, that religious purpose did not predominate. This may be accomplished by requiring that, once a plaintiff establishes the existence of an improper religious purpose, the burden shift to the defendant to show that the challenged action would have been undertaken even in the absence of such impermissible motive. This allocation of proof has been adopted by the Court in other contexts where purpose is relevant to the constitutionality of government action, *see, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hunter*, 471 U.S. at 222; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights*, 429 U.S. at 252, and accords with purpose analysis inquiry generally. *See* Fallon, 111 Harv. L. Rev. at 72 ("Once it is agreed which purposes are forbidden, the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decisionmakers, the government would likely have enacted a challenged statute or taken other contested steps").

Where a display is erected with the purpose of exhibiting religious texts or symbols in order to advance religion or religious belief, and additional secular material is included as

mere dressing, the analysis is simple: the frame would not be hung but for the picture. That is clearly the case here.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

AYESHA KHAN
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234

WILLIAM M. HOHENGARTEN*
IAN HEATH GERSHENGORN
VICTORIA H. JUEDS
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 467-4999

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* *Counsel of Record*